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September 10, 2001

VIA HAND DELIVERY

Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: *Petition of MCI WorldCom to Enforce Interconnection Agreement with BellSouth
Telecommunications, Inc.*
Docket No. 01-00513

Dear Mr. Waddell:

Enclosed please find the original and thirteen copies of BellSouth Telecommunications, Inc.'s Memorandum in Response to MCI WorldCom's Inc.'s Motion for Summary Judgment. Copies have been provided to counsel of record.

Cordially,



Joelle Phillips

JP/jej

Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition of MCI WorldCom to Enforce Interconnection Agreement with BellSouth Telecommunications, Inc.*

Docket No. 01-00513

BELLSOUTH TELECOMMUNICATION INC.'S MEMORANDUM
IN RESPONSE TO MCI WORLD COM, INC.'S
MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Memorandum in opposition to the summary judgment motion filed by MCI WorldCom, Inc. ("MCI"). To date, no evidentiary record has yet been compiled in this case on which such summary disposition could be granted.¹ Although MCI claims that it is entitled to relief as a matter of law in light of the ruling in the *Petition of MCI WorldCom to Enforce Interconnection Agreement with BellSouth*, Docket No. 99-00662 (June 15, 2001) ("MCImetro Order"), when the evidence is submitted, it will be apparent that there are genuine issues of material fact that both distinguish this case from the MCImetro case and preclude the summary disposition of MCI's claims. This case is not the identical twin of the MCImetro case, and BellSouth is entitled to

¹ BellSouth acknowledges the rulings the Tennessee Regulatory Authority ("TRA" or "Authority") has made in connection with prior complaints seeking reciprocal compensation for ISP-bound traffic. Recognizing the TRA's familiarity with the issues concerning ISP-bound traffic and the prospect that this case may be appropriate for more expedited resolution in light of that familiarity, BellSouth is willing to waive cross-examination, dispense with a live hearing, and submit the case to the Hearing Officer based on the pre-filed testimony and briefs. While BellSouth is willing to dispense with a live hearing and cross-examination, BellSouth is not willing to waive its right to present evidence and form an evidentiary record specific to this matter.

create an evidentiary record specific to this case and have the case decided on the basis of that evidence.

MCI urges that this matter is appropriate for summary adjudication based on the Authority's decision in the MCImetro case, because Brooks Fiber Communications of Tennessee, Inc. ("Brooks Fiber") elected to "opt in" to the MCImetro interconnection agreement. That ruling is not dispositive of this case, however, due to: (1) the differences between the contracts themselves in light of the second (opt-in) agreement between these parties; (2) the distinct circumstances surrounding the opt-in by Brooks Fiber and the intent of the parties as demonstrated by these distinctions; as well as (3) the lack of any evidence in this case regarding the tandem or end-office switching being performed by Brooks Fiber. When evidence is submitted in this case, the evidence will demonstrate differences between this case and the MCImetro case, which differences preclude disposition based on the MCImetro ruling. Accordingly, BellSouth submits that it would be error for the Hearing Officer to dispose of the matter on summary judgment.

First, the specific terms of the opt-in agreement itself distinguish the Brooks Fiber agreement from the MCI agreement. In light of the language in the opt-in agreement, questions of fact exist regarding the applicable per-minute rates for reciprocal compensation. These issues were not addressed in the MCImetro case because, in that case, there was no opt-in agreement. Specifically, MCI requests that the Hearing Officer endorse rates different from the cost-based rates ordered by the Authority while the opt-in agreement provides that the parties shall accept amendments resulting from regulatory action, such as the Authority's December 1999 decision in the UNE docket. Unlike the MCImetro case, the determination of the issue in this case is

governed in part by the language of the opt-in agreement, which was not present in the MCImetro case.

Second, Brooks Fiber opted-in to the MCImetro contract on June 16, 1999, more than two years after the MCImetro contract was approved by the Authority on May 6, 1997. The facts, circumstances, and governing legal principles applicable to Brooks Fiber's *adoption* of the agreement at issue in this proceeding are different from the facts, circumstances and governing legal principles surrounding the *negotiation* of the previous agreement. By the time of the opt-in, there can be no question that BellSouth's position on ISP-bound traffic was well known to Brooks Fiber. This fact is relevant to the question, considered by the Hearing Officer in the MCImetro case, of whether these parties "intended to require reciprocal compensation for ISP-bound traffic." July 12, 2001 Order, Docket No. 99-00662.

Third, MCI's complaint appears to seek recovery of reciprocal compensation of the tandem switching rate. There is a genuine issue of material fact as to whether MCI provides tandem switching in accordance with Federal Communications Commission ("FCC") rules, and no evidence has been presented regarding the operation of the Brooks Fiber switches at issue.

The FCC recently issued an Order² addressing the treatment and classification of ISP-bound traffic that directly contradicts MCI's theory of recovery in this proceeding. The FCC Order is consistent with BellSouth's position regarding ISP-bound traffic, and BellSouth is entitled to create a record of the facts in this case, which bear on these legal issues.

² Order on Remand and Report and Order, *Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, FCC 01-131, CC Docket Nos. 96-98 & 99-68 (rel. Apr. 27, 2001) ("FCC Remand Order").

Finally, and importantly, MCI's motion is simply premature. No testimony has yet been filed. BellSouth's testimony will demonstrate that material issues of disputed fact exist in the case. MCI's Motion should therefore be denied and the parties should proceed with the filing of testimony as ordered by the Authority on August 21, 2001.³

II. ARGUMENT

A. This Case Is Not Appropriate For Summary Disposition Because No Evidence Has Yet Been Submitted.

Even assuming the Authority had procedures for summary judgment proceedings (which it does not), the issues raised in MCI's motion are not appropriate for summary disposition. Summary judgments are appropriate only when there are no genuine material factual disputes regarding the claim embodied in the motion and when the moving party is entitled to a judgment as a matter of law. *See Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995). In summary judgment proceedings, the evidence must be viewed in the light most favorable to the nonmoving party and all reasonable inferences must be drawn in the nonmoving party's favor. *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997). Thus, a summary judgment should be granted only when the evidence reasonably supports only one conclusion -- that the moving party is entitled to a judgment as a matter of law. *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *Carvell*, 900 S.W.2d at 26. In order for that to be the case, it is obvious that an evidentiary record must first be established.⁴ BellSouth is entitled to submit evidence before a decision is rendered.

³ BellSouth has agreed not to oppose MCI's request to temporarily hold the filing of testimony in abeyance while this motion is considered.

⁴ The establishment of an evidentiary record need not create delay. As noted above, BellSouth has no objection to disposition of this matter without a live hearing or cross-examination.

The Tennessee Supreme Court has repeatedly stated that the purpose of a summary judgment proceeding "is not the finding of facts, the resolution of disputed factual issues, or the determination of conflicting inferences reasonably to be drawn from the facts." *Bellamy v. Federal Express Corp.*, 749 S.W.2d 31, 33 (Tenn. 1988). Rather, according to the court, the purpose of summary judgment "is to resolve controlling issues of law, and that alone." *Id.*

Given the distinctions created in this case by the differing circumstances surrounding the opt-in, in contrast to the circumstances surrounding the negotiation and creation of the interconnection agreement at issue in the MCImetro case, this case is not subject to disposition by application of legal conclusions from the MCImetro case. Rather, the ruling in this case must be based on the facts specific to this case, and those facts will not be the mirror image of the MCImetro facts.

B. Evidence As To The Intent Of The Parties In This Matter Will Be Distinct And Substantially Different From The Evidence In The MCImetro Case.

The cardinal rule in the construction of a contract is to ascertain the intent of the parties. *Hamblen County v. City of Morristown*, 656 S.W.2d 331, 333 (Tenn. 1983). In keeping with this well-settled rule, the TRA's order in the MCImetro case focused on whether those parties intended to provide reciprocal compensation for ISP-bound traffic. MCImetro Order at 15. In this case, as evidenced by the circumstances surrounding Brooks Fiber's opt-in, BellSouth did not intend to pay reciprocal compensation for terminating local traffic on MCI's network, and Brooks Fiber knew this.

In determining the parties' intent to a contract, the Authority should look at the circumstances in existence at the time the opt-in occurred as well as the subsequent action of the

parties. *Marshall v. Jackson & Jones Oils, Inc.*, 20 S.W.3d 678, 681 (Tenn. App. 1999); *accord Frizzell Construction Co., Inc. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 85 (Tenn. 1999), *cert. denied*, 530 U.S. 1238, 120 S. Ct. 2679, 147 L.Ed.2d 289 (2000). Just as the Authority did in the prior MCI order, it must hear evidence of and rule on the intent of the parties. In light of the distinct circumstances surrounding the opt-in by Brooks Fiber, the Authority cannot automatically assume that the intent of the parties in the prior MCImetro proceeding is the same as that in the Brooks Fiber opt-in agreement.

Whether or not the agreement is ambiguous, the Authority should consider such facts in interpreting the agreement. *See Stovall v. Dattel*, 619 S.W.2d 125, 127 (Tenn. Ct. App. 1981) (in construing a contract, court must consider the "situation involving the parties, the nature of the business in which they are engaged and the subject matter to which the contract relates"). As the Tennessee Supreme Court has explained:

The court in interpreting words or other facts of the parties puts itself in the position which they occupied at the time the contract was made. In applying the appropriate standard of interpretation *even to an agreement that on its face is free from ambiguity, it is permissible to consider the situation of the parties and the accompanying circumstances at the time it was entered into* -- not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning to be given to the agreement.

Hamblen County, 656 S.W.2d at 334 (quoting *Restatement of Contracts*, section 235(d) and comment) (emphasis added).

In this case, the "situation of the parties," as BellSouth will demonstrate through pre-filed testimony, was this: BellSouth had made its position clear regarding ISP-bound traffic, and the parties had no reason to specifically reference it in the provision defining local traffic.⁵ Unlike

⁵ As a practical matter, the opt-in process provided no opportunity to alter the language. Nonetheless, specific reference was unnecessary given the parties' awareness of BellSouth's

the MCImetro case, these parties entered into the agreement at a later time, a time when Brooks Fiber must have known of BellSouth's intent.

When permitted to submit testimony, BellSouth will provide testimony demonstrating that BellSouth posted a notice on its Carrier Notification website advising all CLECs, including Brooks Fiber, that BellSouth did not consider ISP-bound traffic to be interstate in nature. A copy of that notice is still on BellSouth's website today. In addition, on March 27, 1998, BellSouth filed its brief in Docket 98-00118 in which BellSouth clearly articulated its position that ISP-bound traffic was interstate in nature. Accordingly, by the time of the Brooks Fiber opt-in, there could be no question as to BellSouth's understanding on this issue. Accordingly, the evidence concerning the circumstances under which the parties entered into the opt-in agreement will be distinct from the evidence of the circumstances, which informed the intent of the parties, in the MCImetro case.

C. Evidence Bearing On Whether The Per-Minute Rates MCI Is Asking The Hearing Officer To Approve Are Appropriate Will Be Different Than The Evidence In The MCImetro Case Given The Different Opt-In Agreement.

In its motion, MCI asks the Hearing Officer to "issue a summary judgment ordering BellSouth to pay Brooks Fiber reciprocal compensation for ISP-bound traffic as provided in the Opt-In Agreement." (P. 6, Motion). It is noteworthy that MCI does not ask in its Motion that the Hearing Officer determine that a sum certain is owed. Nor did MCI seek a sum certain in its June 13, 2001 Petition.⁶ (See Requested Relief at p. 5-6). Notwithstanding its decision not to ask the Hearing Officer to determine a sum certain, MCI argues in its Petition that "... the rate

intent regarding the treatment of ISP-bound traffic.

⁶ TCG/AT&T's complaint in Docket No. 01-00701 did seek a sum certain. That case is expected to settle.

for terminating a local call is \$0.0050 per minute for interconnection through a tandem or \$0.0040 per minute for interconnection directly to an end office." These were rates negotiated by the parties in 1997. These rates have been superceded by the cost-based rates established by the Authority in the UNE Proceeding, Docket No. 97-01262. The rates established by the Authority are \$.0008041 for end office switching and \$.0009778 for tandem switching. The Authority rendered its decision in the UNE docket on December 19, 2000.

The June 16, 1999 opt-in agreement between the parties states that "Brooks and BellSouth *shall accept and incorporate* any amendments to the Tennessee BellSouth/MCI Interconnection Agreement which relate to the above attachments and Terms and Conditions, executed as a result of any final judicial, regulatory, or legislative action."⁷ (See p. 2 of Agreement, emphasis added.) Because this language appears in the opt-in agreement and not in the interconnection agreement, this provision was not at issue in the MCImetro case on which the Motion for Summary Judgment is basically premised. Notwithstanding this provision, MCI has taken the position that it will not amend its interconnection agreement when requested, in order to require BellSouth to continue paying the old rates. Accordingly, under the terms of the opt-in agreement, MCI should accept the Authority's rates. If MCI continues to reject the Authority-ordered rates, then, at a minimum, there is a genuine question of fact as to which rates should apply. The opt-in agreement creates distinct issues, which are not resolved by findings made in the MCImetro case.

With respect to the reference to tandem switching rates, Brooks Fiber has presented no evidence supporting its entitlement to such rates based on the type of switching it performs.⁸ The

⁷ The "above attachments" include the Price Schedule. See page 1 of Agreement.

⁸ The failure to provide such evidence was noted by the Hearing Officer in the June 15,

Authority has considered the issue of the tandem interconnection rate in several prior arbitrations, including the Intermedia Arbitration, where the Authority concluded that a CLEC must meet both a functionality and geographic comparability test. Intermedia Order at 11. There is no evidence that Brooks Fiber's switches perform a tandem function.

While it appears that the FCC may no longer require a tandem functionality test to be met, a CLEC still must meet the geographic comparability test in order to be entitled to a tandem switching rate. The FCC has stated that "[w]here the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate." 47 C.F.R. § 51.711(a)(3). No evidence on this geographic area issue has been provided by Brooks Fiber.

To the extent that MCI suggests that it seeks only a limited order -- not bearing on the specific rates applicable, but rather addressing only discrete legal issues of the treatment of ISP-bound traffic which are common to this case and the MCImetro case -- recent experience demonstrates the mischief that will result from such an order. Although MCImetro sought no sum certain in Docket No. 99-00662, MCImetro is currently seeking sanctions against BellSouth by arguing that the MCImetro order, which dealt solely with whether ISP-bound traffic was local under the interconnection agreement, is dispositive of billing issues distinct and different from the treatment of ISP-bound traffic. If MCI obtains an order in this docket, without submission of any evidence, it will no doubt pursue the same course of distorting such an order to address issues of rates, calculation of minutes, and determination of jurisdiction of calls just as it has

2001, Initial Order in the MCImetro case. As a result of the lack of evidence, the Hearing Officer was unable to determine the switching actually performed. Order at 28-29.

done in the other docket. Accordingly, it is necessary that evidence be presented regarding the rate issues raised by MCI.

D. The Prior MCImetro Order Is Not Dispositive Of The Legal Interpretation of the Brooks Fiber Agreement.

The Tennessee Supreme Court has recognized the principle that laws, in force at the time of the making of a contract, enter into and form a part of the contract as if they were expressly incorporated into it. *Hannum v. McInturf*, 65 Tenn. 225 (Tenn. 1873). At the time that MCI and BellSouth entered into the Brooks Fiber Agreement on June 16, 1999, the FCC's February 26, 1999 Declaratory Ruling was in effect and was the governing authority for the treatment of ISP-bound traffic. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 14 FCC Rcd 3689 (FCC Feb. 26, 1999) ("Declaratory Ruling"). In the Declaratory Ruling, the FCC held that ISP-bound traffic was not subject to reciprocal compensation because it was largely interstate. Declaratory Ruling at ¶ 12 (ISP-bound traffic does not "terminate at the ISP's local server, as CLECs and ISPs contend, but continues to the ultimate destination or destinations, specifically at an Internet web site that is often located in another state."); *see also*, FCC Remand Order at ¶ 1 ("We previously found in the Declaratory Ruling that [ISP-bound traffic] is interstate traffic subject to the jurisdiction of the Commission under section 201 of the Act and is not, therefore subject to the reciprocal compensation provisions of section 251(b)(5).").

"Local Traffic" is defined in the second MCI agreement as "any telephone call that originates and terminates in the same LATA" Second MCI agreement, Attachment 11. Therefore, as a matter of law at the time of the execution of the second MCI agreement, the definition of "Local Traffic" could not have included ISP-bound traffic because, according to the

Declaratory Ruling, ISP-bound traffic was interstate and thus could not "originate[] and terminate[] in the same LATA." Under the Tennessee authority outlined above, the then-existing FCC ruling that ISP-bound traffic was interstate, became part of the contract created by the opt-in.

Second, the prior MCImetro order and other previous decisions cited by MCI, are not dispositive of this specific case. In those decisions, the Authority, in finding that the parties intended to pay reciprocal compensation for ISP-bound traffic, focused on the fact that there was no express intent to exclude ISP-bound traffic from the definition of "Local Traffic." Namely, the Authority stated that there was nothing in those agreements that specifically addressed ISP-bound traffic nor any mechanism to account for such traffic. *See, for example, In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 99-00430 (Aug. 11, 2000) ("DeltaCom Order"). Thus, under the standard articulated in the decisions cited by MCI, the Authority found that ISP-bound traffic was subject to reciprocal compensation unless the agreement explicitly stated otherwise. These rulings were based on the premise that the law at the time treated ISP-bound traffic as local. As of the Declaratory Ruling, however, that was no longer the case. Accordingly, given that this agreement arose by opt-in after the Declaratory Ruling, this case is subject to a different premise.

Again, this fact distinguishes this case from the MCImetro case, and precludes summary disposition on the basis of the order in that case.

E. There Is A Genuine Issue As To Whether The Authority Has Jurisdiction To Order Anything Other Than That Reciprocal Compensation Is Not Owed For ISP-Bound Traffic.

The Authority's analysis must now change in light of the FCC's Remand Order. Under that Order, the FCC confirmed that ISP-bound traffic is not subject to the reciprocal compensation provisions of Section 251(b)(5) and that it is predominately interstate access traffic under Section 251(g). FCC Remand Order at ¶¶ 1, 34, 36, and 44. In its Remand Order, the FCC determined that the payment of reciprocal compensation for Internet-bound tariff had "created opportunities for regulatory arbitrage and distorted the economic incentives related to competitive entry in the local exchange access markets. *Id.* ¶2. The Commission concluded that this regime, which discouraged CLECs from providing local voice service, was contrary to public policy and fundamentally incompatible with the pro-competitive goals of the 1996 Act. *See id.*, ¶¶21, 70-71, 87 n.171. Additionally, in the FCC Remand Order, the FCC initiated steps to limit the regulatory arbitrage that resulted from the payment of reciprocal compensation for ISP-bound traffic. *Id.* at ¶ 2.

As a result, pursuant to binding authority, the only way parties to an interconnection agreement can now owe each other reciprocal compensation for the transport and termination of ISP-bound traffic is if they explicitly included such a provision in the agreement. Without it, federal law requires that any state commission interpreting an agreement find that reciprocal compensation is not owed for ISP-bound traffic.

Indeed, there is a serious question as to whether the Authority has jurisdiction to order anything other than that reciprocal compensation is not owed for ISP-bound traffic. *See* FCC Remand Order at ¶ 82 ("Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will

no longer have authority to address this issue.").⁹ Simply put, to follow the analysis set forth in the Brooks Fiber, Adelphia and MCI Orders¹⁰ would be contrary to federal law and the FCC's expressed goal to limit the regulatory arbitrage that has resulted from the payment of reciprocal compensation for ISP-bound traffic.

The FCC's statement that the Remand Order does not "preempt any state commission decisions regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here," does not require a different conclusion. FCC Remand Order at ¶ 82. As made clear by its express terms, the FCC Remand Order does not preempt "any state commission *decisions*." The Authority has yet to issue a decision regarding compensation for ISP-bound traffic for the Second MCI/Brooks Fiber Agreement. Thus, the FCC determination that ISP-bound traffic is not subject to reciprocal compensation applies to the Authority's interpretation of that agreement.

III. CONCLUSION

BellSouth is well aware that, given the Authority's familiarity with issues and arguments concerning ISP-bound traffic, this case may be suitable for a more expedited review to the extent that similar issues will be presented. Recognizing this situation, BellSouth has agreed to a

⁹ This jurisdictional question is further complicated for opt-in agreements because the FCC Remand Order prohibits carriers from opting into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic. FCC Remand Order at ¶ 82. The FCC held that Section 252(i) applies "only to agreements arbitrated or approved by state commissions pursuant to section 252; it has no application in the context of an intercarrier compensation regime set by this Commission pursuant to section 201." *Id.*


¹⁰ *In re: Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, Docket No. 98-00118 (April 21, 1998); *In re: Complaint of AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. Against BellSouth Telecommunications, Inc. to Enforce Reciprocal Compensation and "Most Favored Nation" Provision of the Parties' Interconnection Agreement*, Docket No. 98-00530 (April 14, 2000); *In re: Petition of MCI WorldCom, Inc. to Enforce Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. 99-00662

streamlined process, which will expedite resolution of this case by eliminating both cross-examination and a live hearing. As discussed above, however, this case is not a carbon copy of earlier cases. Factual distinctions exist, and BellSouth has a right to create an evidentiary record of those facts before the case is resolved.

For the foregoing reasons, summary disposition of MCI's complaint is not appropriate. Accordingly, the motion for summary judgment should be denied, and the matter should proceed to give the parties the opportunity to create an evidentiary record in this case.

Respectfully submitted,

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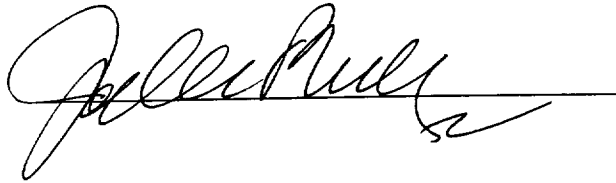
(June 15, 2001).

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2001, a copy of the foregoing document was served on the parties of record, via the method indicated:

- ☐ Hand
- ☒ Mail
- ☒ Facsimile
- ☐ Overnight

Henry Walker, Esquire
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A handwritten signature in black ink, appearing to read "Henry Walker", is written over a horizontal line.